

## **APPENDIX**

(Excerpts from the Court of Criminal Appeals' Decision)

**Filed July 3, 2001**



# **OPINION**

**[Deleted: Summary of Facts and Testimony]**

## **ANALYSIS**

**[Deleted: Especially Heinous, Atrocious or Cruel Aggravating Circumstance]**

**[Deleted: Avoiding Arrest Aggravating Circumstance]**

**[Deleted: Impeachment of Witness]**

**[Deleted: Accomplice Instruction]**

### **Sentencing Instructions:**

Because the murder in this case occurred before the 1989 amendments to the death penalty statute, the trial court instructed the jury under the law in existence at the time of the crime. The appellant insists, however, that the trial court should have instructed the jury pursuant to the 1989 changes. Specifically, the appellant asserts the judge should have instructed the jury that it must find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Prior to 1989, the statute called for the death penalty upon a finding that the aggravating circumstances are not outweighed by the mitigating circumstances. T.C.A. § 39-2-203 (1982). The supreme court has consistently held that a trial court does not err by instructing the jury under the statute as it existed at the time of the offense. See, e.g., State v. Walker, 910 S.W.2d 381, 397 (Tenn.

1995); State v. Brimmer, 876 S.W.2d 75, 82 (Tenn. 1994). This issue is without merit.

Similarly, the appellant contends the trial court should have provided the jury instructions on the nonstatutory mitigating circumstances he submitted to the court. In State v. Cauthern, 967 S.W.2d 726, 746-47, (Tenn. 1998), a capital case in which a resentencing hearing was ordered for a pre-1989 murder, the supreme court adopted the portion of this Court's opinion that addressed this very issue. Citing State v. Odom, 928 S.W.2d 18 (Tenn. 1996), the court held that the trial court was not compelled to provide nonstatutory instructions on mitigating evidence and should have instructed the jury under the law as it existed. The trial court in this case did precisely that. Accordingly, there is no merit to the appellant's contention.

**[Deleted: Prosecutorial Misconduct]**

**[Deleted: Exclusion of Witness]**

#### **Removal of Juror for Cause:**

The appellant contends the trial court erroneously excused a prospective juror during voir dire. He argues that, although the juror initially stated he could not vote for imposing the death penalty, upon further questioning by defense counsel the juror acknowledged that he could follow the mandates of the law as instructed by the trial judge. The appellant further argues the trial judge improperly and excessively questioned the juror even after he had allegedly been rehabilitated by defense, thereby forcing his removal from the panel.

Upon questioning by the prosecutor, prospective juror Yual Carpenter stated that no matter what the case he could not personally agree to sentence someone to death. The prosecutor asked for excusal. The following exchange then occurred:

Prospective Juror Carpenter: The question he asked, well, if I did find like that, I couldn't -- because of my heart I couldn't live with myself by doing that, by putting my name on that I just --

Defense Counsel: You don't think under -- if His Honor instructed you that it was the law and all that --

Juror: Yes.

Counsel: -- and you went through that instruction that even if you found that that enhancement factor exists you're saying you wouldn't be able to do it?

Juror: I don't believe so because, you know . . .

Counsel: You don't think you'd be able to follow the law?

Juror: I could follow the law, but, you know, it would probably be --

Counsel: Well, I mean, you regard death as a very serious thing?

Juror: Yes.

Counsel: And having the power to take someone's life is a very --

Juror: Yes. I don't think -- my signature shouldn't have that pull.

. . .

Juror: What I'm trying to get you to understand is that like I couldn't put my name on it.

Counsel: You don't think you could do it even if His Honor instructed you to follow the law?

Juror: See, then it would be forcing me to do something against my will.

Counsel: Let me ask you this. If His Honor were to instruct you to follow the law would you follow the law?

Juror: Yeah, I'll follow the law.

The trial court then asked Carpenter several questions regarding his position:

Court: All right. Mr. Carpenter, let me ask you, sir, you say you couldn't write your name down. Now, the -- you understand what the law is in this?

Juror: Yes, sir.

Court: -- that you have the choice of life imprisonment or death by electrocution; is that correct?

Juror: Yes, sir.

Court: Now, that's the law in the state of Tennessee.

Juror: Yes, sir.

Court: You understand that? Now, are you saying that you could not follow that law if it were presented to you beyond a reasonable doubt and to a moral certainty by the aggravating circumstances overcoming the mitigating circumstances you could not follow the law as far as death is concerned?

Juror: No, sir.

Court: You could not?

Juror: (No audible response.)

Court: All right. You'll be excused. The Court finds that this juror irrevocably is committed prior to trial in this case that he will not follow the law of the state of Tennessee.

The applicable standard for determining whether a juror was properly excused for cause because of his or her beliefs on the death penalty was delineated in Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), and is as follows: "whether the juror's views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" See State v. Alley, 776 S.W.2d 506, 518

(Tenn. 1989) (Tennessee Supreme Court adopts Wainwright standard). Furthermore, the United States Supreme Court held that "this standard does not require that a juror's bias be proved with 'unmistakable clarity.'" Wainwright, 469 U.S. at 424, 105 S.Ct. at 852. The Court also noted that "deference must be paid to the trial judge who sees and hears the jurors." Id. at 426, 105 S.Ct. at 853.

It appears to us that Carpenter's answers "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 424, 105 S.Ct. at 852. See also, State v. Smith, 893 S.W.2d 908, 915-16 (Tenn. 1994). Although this determination might not be "unmistakably clear," it need not be. Moreover, as the United States Supreme Court has held, great deference should be given to the trial judge, who is "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Wainwright, 469 U.S. at 426, 105 S.Ct. at 853. The trial judge's findings "shall be accorded a presumption of correctness and the burden shall rest upon the appellant to establish by convincing evidence that [those findings were] erroneous." State v. Alley, 776 S.W.2d 518 (Tenn. 1989). Although the appellant claims that Carpenter was rehabilitated by defense counsel's questions, the record simply does not support this argument. This issue is without merit.

**[Deleted: Statutory Review]**

## **CONCLUSION**

Accordingly, for the reasons stated above, we affirm the appellant's sentence of death. Because this case must automatically be reviewed by the Tennessee Supreme Court, we will not set an execution date. See T.C.A. § 39-13-206.

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DAVID H. WELLES, JUDGE

CONCUR:

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JERRY L. SMITH, JUDGE

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JAMES CURWOOD WITT, JR., JUDGE